

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CHRISTIE BOWERS,	)	Case No.: C08-1768RSM
	)	
Plaintiff,	)	DEFENDANTS RESPONSE TO
	)	PLAINTIFFS CROSS MOTION FOR
vs.	)	SUMMARY JUDGMENT
	)	
ROBIN KLETKE and ROBIN COHEN,	)	
husband and wife and the marital community	)	NOTE ON MOTION DOCKET:
composed thereof,	)	SEPTEMBER 10, 2010
<i>Pro Se</i> Defendants	)	

**INTRODUCTION**

Defendants Robin Kletke and Robin Cohen, pursuant to Fed.R.Civ.P 56, file this Response to Plaintiffs Cross Motion for Summary Judgment.

Plaintiff argues that they are entitled to summary judgment on her RCW 9.73.030 claim that Defendant's recorded unspecified emails contained in Plaintiff's email account. To prevail on a cross motion for summary judgment, Plaintiff must establish all of the essential elements of her claim as a matter of law by showing actual evidence not in dispute. Plaintiff does not identify any evidence of recording or interception of her emails. Instead, Plaintiff filed 548 pages and almost 76 megabytes of immaterial documentation trying to support Plaintiff's personal *conclusions* that Defendants accessed Plaintiff's email account and therefore must have recorded some unknown emails.

1 In response to Defendants summary judgment motion, Plaintiff did not directly address the  
2 issues raised by the Defendant – lack of email evidence of interception, recording, or divulging  
3 contents. Without showing evidence, Plaintiff has failed to refute Defendants summary  
4 judgment motion and Defendant’s motion should be granted and her cross motion should be  
5 denied.

6 Defendants argue that Plaintiff has not adequately responded to Defendant’s Summary  
7 Judgment Motion and has not met her initial burden for a cross motion. Therefore, the  
8 Defendants are under no obligation to respond to the immaterial allegations in this cross motion  
9 and Plaintiffs Cross Motion for Summary Judgment should be denied.

## 10 11 **ARGUMENT**

### 12 **Plaintiff’s burden for Summary Judgment has not been met**

13 The Plaintiff’s burden in this cross motion is significant. RCW 9.73.030 protects against the  
14 *interception* or *recording* of a private communication. Plaintiff has not shown any particular  
15 evidence of interception or recording, and instead uses her own expert analysis and conclusions  
16 to argue for summary judgment. In her cross motion, Plaintiff becomes the movant and the  
17 Defendants the non-movants. Where the movant will have the burden of proof on an issue at  
18 trial, it must "affirmatively demonstrate that no reasonable trier of fact could find other than for  
19 the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *see*  
20 *also S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (noting that a party  
21 moving for summary judgment on claim as to which it will have the burden at trial "must  
22 establish beyond controversy every essential element" of the claim). Here, the Plaintiff relies on  
23 immaterial issues tied together with personal conclusions as justification for summary judgment,  
24 Plaintiff doesn’t “affirmatively demonstrate” the existence of any interception or recording.

**Plaintiff's Responses and Arguments Do Not Involve Material Facts**

RCW 9.73.030 does not prohibit access to a private communication, yet that is what the Plaintiff has spent most of her time pursuing. In this case, a material fact would be the existence of an email, tied to the Defendants that can be shown to be intercepted or recorded. It is that simple. Plaintiff has attempted to make this case about access to her email account, but access does not fit the statute. Plaintiff's analysis, exhibits, declarations, and conclusions of email account access are immaterial to the discussion of interception or recording an email in this summary judgment motion.

The 548 pages of documents filed on 8/16/2010 did not show recording of any email(s). Plaintiffs Factual Summary includes the following conclusion, "accessed Ms. Bowers' texdandy@juno.com email account, and by doing so, recorded private communications in violation of RCW 9.73.03.00" (DKT 105, pg. 4, lines 5-6) (emphasis added). This is a conclusion, not evidence, and is not acceptable in either a summary judgment response or cross motion. Plaintiff makes several other statements in her response trying to equate allegations of access to an email account with recording emails. In all cases, Plaintiff relies on inadmissible expert analysis of internet technology, undisclosed witness declarations, and her own descriptions and conclusions. None of those are evidence. Plaintiff even attempts to bring the Court in as her expert by asking for judicial notice about the inner workings of email and the internet. This Court has already indicated in a previous order (DKT 97, pg. 7, lines 7-22) that expert discussions would likely be required in this case and therefore has already determined that the technical aspects of the internet and web based email are outside common experience and require expert discussion.

**Disputed Issues Must Be Viewed In Light Most Favorable To Defendants**

In the case of Plaintiff's Cross Motion, all inferences to disputed items must be viewed in the light most favorable to the Defendants. As indicated in *Adickes v. SH Kress & Co.*, 398 US 144,

1 158-9 (1970).

2 Because "[o]n summary judgment the inferences to be drawn from the underlying facts  
3 contained in [the moving party's] materials must be viewed in the light most favorable to the  
4 party opposing the motion," *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962),

5 For the purposes of this Cross Motion of Summary Judgment, the disputed access to  
6 Plaintiffs email account and the existence of private communications must be viewed in the light  
7 most favorable to the Defendants – namely that no emails existed in the account and Defendants  
8 didn't access the account. Without those two elements, Plaintiffs conclusion that Defendants  
9 must have therefore recorded private emails totally fails.

10 Plaintiff asserts that the Court should conclude on Summary Judgment that the emails from  
11 July 9, 2010 allegedly left in her account are private communications. Defendants argue that  
12 such a determination of disputed facts cannot be made in a summary judgment proceeding.  
13 Some of those emails come from group email lists and therefore are not private (DKT 107, pgs.  
14 9, 17, 71, 74-78, 83, 87, 91-95, 127-128). At least one email was authored by the Defendant  
15 (DKT 107, pg. 83). The determination that these emails are private should be held in the light  
16 most favorable to the Defendants – namely that these are not private communications.

17 Plaintiff's analysis and conclusions based on her allegations fail to meet her burden as the  
18 moving party in a summary judgment motion and her motion should be denied.

### 19 **Plaintiffs Lack of Expert Witnesses Makes Her Case Improvable**

20 The Plaintiff admits that the case requires expert witnesses and admits that claims under 18  
21 USC 2520 and Washington Privacy Act should be dismissed. Defendants argue that the claim  
22 under RCW 9.73.030 also requires expert testimony and should be dismissed.

23 Plaintiff has attempted to circumvent her lack of expert testimony by offering her own  
24 explanation and analysis of how the internet and internet email operates. Defendants object to  
25 both Plaintiff's and her attorney's attempts at being experts in internet technology. Plaintiff also  
26

1 offers third party testimony which makes conclusions based on technical analysis and  
2 information not personally witnessed.

3 Plaintiff has not identified any expert witnesses, and has lost the ability to use expert  
4 witnesses (DKT 42). This court has already indicated that analysis of the differences between  
5 the Wiretap Act and Stored Communications portions of the ECPA would require expert  
6 testimony (DKT 97, pg. 7, lines 7-22). The Washington State Wiretap Act (RCW 9.73.030) will  
7 require similar expert testimony, especially without any direct evidence of recording.

8 Plaintiff has only offered her own inadmissible conclusions. Any real discussion and  
9 conclusions about the technical issues in this case will require expert testimony that the Plaintiff  
10 is not allowed.

#### 11 12 **DEFENDANT'S OBJECTIONS**

13 Plaintiff offers no real evidence that would be admissible in court to support a cross motion  
14 for summary judgment. In order to be able to reference the court record, Plaintiff filed an over  
15 length Motion for Issue Preclusion (20 pages) containing information and witnesses not  
16 previously disclosed to the Defendants. Plaintiff assailed the Defendants and the Court with 548  
17 pages of motion and exhibits. The majority, if not all, of that new information should be stricken  
18 per violations of Fed.R.Civ.P 26's rules of discovery by applying sanctions available from  
19 Fed.R.Civ.P 37 and under Fed.R.Civ.P 56(e) as information inadmissible in a summary judgment  
20 proceeding. Defendants have already listed most of their objections to items presented in  
21 Plaintiffs Response and associated filings (DKT 109, pgs. 5-10).

22 Here, Defendants strongly object to Plaintiff's inclusion of damages claims, (DKT 105,  
23 section 6, pgs. 18-19) that were not previously disclosed in Plaintiff's Initial Disclosures or  
24 answers to Interrogatories. Even now, Plaintiff only offers unsubstantiated damage claims of  
25 mental pain and suffering without any medical or professional documentation. Plaintiff has not  
26 offered ANY evidence of her alleged damages in spite of being asked for 18 months.

1 Plaintiff is engaging in the same tactics used since the beginning of the case to prejudice the  
 2 Defendants. Plaintiff's inclusion of new witnesses, information, claims, damages, and other  
 3 documentation is yet another example of her disregard for the rights of the Defendants and the  
 4 Federal Rules of Civil Procedure. Defendants ask that these new witnesses, claims, damages,  
 5 and information be stricken per Fed.R.Civ.P 37(c)(1).

6  
 7 **CONCLUSION**

8 The Defendants filed a Motion for Summary Judgment on very specific issues, lack of  
 9 evidence of any emails that had been intercepted, recorded, or divulged. In response to that  
 10 motion, Plaintiff did not bring forth any particular evidence contesting the Defendant's stated  
 11 facts. Instead, Plaintiff restated allegations of access to her email account, included new  
 12 information in violation of Fed.R.Civ.P 26 and other rules, and based a cross motion for  
 13 Summary Judgment on personal conclusions.

14 Plaintiff has not successfully countered Defendant's Motion for Summary Judgment and has  
 15 failed to meet her burden for a cross motion of summary judgment. Defendants ask the Court to  
 16 deny Plaintiff's Cross Motion for Summary Judgment. The record and legal precedent is clear in  
 17 this case so there is no need to burden the Court with Oral Arguments.

18  
 19 Dated this \_\_6th\_\_ Day of September, 2010 at Woodinville, WA

20  
 21 

22 Robin Cohen

Robin Kletke

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CERTIFICATE OF SERVICE

We, Robin Kletke and Robin Cohen, hereby certify that on September 6<sup>th</sup>, 2010, we filed with the Clerk of the Court via CM/ECF the foregoing DEFENDANTS RESPONSE TO PLAINTIFFS CROSS MOTION FOR SUMMARY JUDGMENT. Said CM/ECF filing will send notifications of this filing to the following:

Gregory Cavagnaro  
Law Offices of Gregory Cavagnaro  
1400 112<sup>th</sup> Avenue SE #100  
Bellevue, WA 98004  
Lead Attorney for Plaintiff

Mark Walters  
1411 Fourth Avenue, Suite 75  
Seattle, WA 98101  
Attorney for Plaintiff

We certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this \_6th\_ Day of September, 2010 at Woodinville, WA



Robin Cohen      Robin Kletke